79-1518

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. A-658

DONALD G. DAVIS,

Petitioner,

vs.

INTERNATIONAL UNION OF CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS LOCAL NO. 135; LORAN W. ROBBINS, PRESIDENT OF INTERNATIONAL UNION OF CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS LOCAL NO. 135; AND LORAN W. ROBBINS, INDIVIDUALLY,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX.

		PAGE
I.	Opinions Below	1
II.	Jurisdiction	2
III.	Statutes Involved	2
IV.	Questions Presented	4
V.	Statement of the Case	4
VI.	Argument	6
VII.	Conclusion	11
	Appendix	A1
	A. November 28, 1979 Order from Seventh Circuit	A2
	B. May 27, 1977 Resignation of Petitioner	A3
	C. Section 19A of Respondent's Bylaws	A4
	D. Excerpts from Deposition	A5

Table of Cases.

Dombrowski v. Dowling, 459 F. 2d 190 (7th Cir. 1972) 10

Gavin v. Structural Iron Workers Local No. 1, 553 F. 2d 28 (7th Cir. 1977) 8, 9

Griffin v. Breckenridge, 403 U. S. 88, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971) 9, 10, 11

Hughes v. Local No. 11 of International Association of Bridge, Structural and Ornamental Iron Workers, 287 F. 2d 810 (3rd Cir. 1961), *cert. denied*, 368 U. S. 829, 7 L. Ed. 2d 32, 82 S. Ct. 51 (1961) 7, 8

Lesser v. Braniff Airways, Inc., 518 F. 2d 538 (7th Cir. 1975) 11

Morrison v. California, 291 U. S. 82, 78 L. Ed. 664, 54 S. Ct. 281 (1934) 10

Moynahan v. Pari-Mutuel Employees Guild of California, Local 280, 317 F. 2d 209 (9th Cir. 1963); *cert. denied*, 357 U. S. 911, 11 L. Ed. 2d 150, 84 S. Ct. 207 (1963) 6, 7

Murphy v. Mount Carmel High School, 543 F. 2d 1189 (7th Cir. 1976) 11

Philipchuk v. Iron Workers, 87 LRRM 3169, 76 LC ¶ 10,653 (1972), Affirmed Without Published Opinion 475 F. 2d 1396 (3rd Cir. 1973)..... 7, 8

Statutes Cited.

Labor-Management Reporting and Disclosure Act, Section 402(o); September 14, 1959; Pub. L. 86-257, Section 3; 73 Stat. 520; Vol. 8, Title 29 U. S. C. Section 402(o), page 796 .....2, 4, 6, 9

Title 42 U. S. C. Section 1985(3); April 20, 1871; R. S. Section 1980; Vol. 10, Title 42 U. S. C. 1985(3), page 1219 .....2, 3, 4, 9, 10, 11

Title 42 U. S. C. Section 1986; April 20, 1871; R. S. Section 1981; Vol. 10, Title 42 U. S. C. Section 1986, page 1219 .....3, 4, 9, 11

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I.

OPINIONS BELOW

The unpublished Per Curiam Order of the United States Court of Appeals for the Seventh Circuit, affirming the District Court, was entered on November 28, 1979, and is set forth as Appendix "C" to the Petition. The Order from the Seventh Circuit, also dated November 28, 1979, is Appendix "A" attached hereto, which is page A2 herein.

The opinion of the United States District Court for the Southern District of Indiana, dismissing the action, was entered on January 11, 1979, and is set forth as Appendix "A" to the Petition. A Motion to Reconsider the January 11, 1979 opinion was denied by the District Court on April 11, 1979, and that opinion is set forth as Appendix "B" to the Petition.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on November 28, 1979; Petitioner obtained an extension of time until March 30, 1980 to file a Petition for Writ of Certiorari and the Petition was filed in March, 1980. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

III.

STATUTES INVOLVED

Section 402(o) of the Labor-Management Reporting and Disclosure Act of 1959, which is as follows:

> (o) 'Member' or 'member in good standing' when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.
>
> (September 14, 1959; Pub. L. 86-257, Section 3; 73 Stat. 520; Vol. 8, Title 29 U. S. C. Section 402(o), page 796)

Title 42 U. S. C. Section 1985(3) is as follows:

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either

> directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.
>
> (April 20, 1871; R. S. Section 1980; Vol. 10, Title 42 U. S. C. Section 1985(3), page 1219)

Title 42 U. S. C. Section 1986 is as follows:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the

benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

(April 20, 1871; R. S. Section 1981; Vol. 10, Title 42 U. S. C. Section 1986, page 1219)

NOTE: Petitioner cited several other statutory and constitutional provisions in the Courts below which have apparently been abandoned in this Court.

IV.

QUESTIONS PRESENTED

A. Whether the Respondent labor organization, which has reserved the right under its bylaws to reject membership applications, was required, under the Labor-Management Reporting and Disclosure Act to accept Petitioner into membership in September, 1978?

B. Whether a cause of action can exist against private parties under Title 42 U. S. C. Sections 1985(3) and/or 1986, when Petitioner has not properly alleged the existence of a class of which he was a member, has not properly alleged a violation of any other federal statute or the Constitution, and has not properly alleged the existence of a conspiracy?

V.

STATEMENT OF THE CASE

Petitioner had been a member of Respondent, Teamster Local Union No. 135, prior to May 27, 1977 and on that date he resigned and waived and released any claim to membership in the Respondent Union in settlement of Cause No. IP 73-C-609, which was pending in the United States District Court for the Southern District of Indiana. The actual resignation, which was

before the Courts below, is reprinted as Appendix "B" attached hereto, which is page A3 herein.

Petitioner went to the office of the Respondent Union in September, 1978 and states that he offered a filled out membership application and dues money; he also states that the Union employee (clerical employee) refused to accept such, and informed him that he was to see Respondent Robbins, who was and is the President of Respondent Union.

Petitioner apparently contends that this act by the clerical employee constituted a singling out of him for rejection of his membership application. In any event, Petitioner has not been admitted to membership in the Respondent Union.

The Respondent Union has specifically reserved in its bylaws the right to accept or reject applicants for membership. Section 19(A) of those bylaws, which is Appendix "C" attached hereto, at page A4 herein, specifically requires the acceptance of an application and dues by the Respondent Union as a condition of membership. (Appendix "C", page A4, Section 19[A][3]). Section 19(A)(4) even provides that no applicant shall become a member in the first ten (10) days following the filing of his written application, and this obviously is to permit the Respondent Union to accept or reject applications for membership.

Petitioner is not now and has not been a member of the Respondent Union since May 27, 1977.

Petitioner states on page 31 of his Petition that a deposition was presented to the District Court by a former business agent [of the Respondent Union] as to past practice, but what Petitioner did not state is that such business agent admitted that on a case by case basis the executive board of the Respondent Union could and did either refuse or admit people to membership. Excerpts from such deposition are attached hereto as Appendix "D" at page A5 herein.

VI.

ARGUMENT

A. Whether the Respondent Labor Organization, Which Has Reserved the Right Under Its Bylaws to Reject Membership Applications, Was Required, under the Labor-Management Reporting and Disclosure Act, to Accept Petitioner Into Membership in September, 1978?

Rule 23(h) of the Rules of this Court requires a petitioner to directly and concisely amplify the reasons relied on for the allowance of the writ consistent with Rule 19. Respondents submit that Petitioner has not followed this Rule for the obvious reason that nothing in Rule 19 lends itself to the granting of the Petition. There is no conflict among the Circuit Courts of Appeal; in fact, there is agreement that the Labor-Management Reporting and Disclosure Act (1) did not take away the right of labor organizations to select and choose their members, and (2) does not give any rights to individuals who are not members of a labor organization. Petitioner herein is attacking the right of a labor organization, which has reserved the right to reject membership applications, to reject him as a member.

The leading case is *Moynahan* v. *Pari-Mutuel Employees Guild of California, Local 280,* 317 F. 2d 209 (Ninth Cir. 1963); *cert. denied* 357 U. S. 911, 11 L. Ed. 2d 150, 84 S. Ct. 207 (1963). In *Moynahan,* as in the present case, an individual applied for membership in a labor organization and was not accepted; he then sued the labor organization demanding that they admit him to membership. The Ninth Circuit affirmed the summary judgment granted to the defendant Union, stating as follows:

> Appellant contends that the Disclosure Act was designed to deny unions discretionary control over their membership; that to recognize acceptance by the union as a 'requirement for membership' contemplated by section 3(o) is to violate the spirit and intent of the Act.

> However, legislative history persuasively demonstrates that Congress did not intend section 3(o) to limit the previously recognized rights of unions to choose their members.
>
> * * * * *
>
> We conclude that the Disclosure Act gives appellant no federal relief. 317 F. 2d at p. 210.

The only case cited by Petitioner on the basic question in this case is *Hughes* v. *Local No. 11 of International Association of Bridge, Structural and Ornamental Iron Workers,* 287 F. 2d 810 (Third Cir. 1961), *cert. denied* 368 U. S. 829, 7 L. Ed. 2d 32, 82 S. Ct. 51 (1961), and that case actually supports the position of Respondents herein. *Hughes* involved an attempt by members of one local union in an International Union to transfer to another local union. The Court required the receiving local to accept the transfers because the International Constitution had not reserved for the local unions the right to accept or reject transfer applications. The *Hughes* court recognized the right of a labor organization to set up any requirements it wishes with respect to the acquisition of membership (See 287 F. 2d at p. 817). *Hughes* was relied on by the plaintiff in *Moynahan, supra,* and the Ninth Circuit not only distinguished *Hughes* but actually quoted as follows from *Hughes* to support their decision:

> '. . . this case [Hughes] may be distinguished from the ordinary case of an application for membership in a voluntary association on the ground that there was not in this case a reservation of power by the organization to refuse membership in its discretion, to those who have fulfilled its standard membership requirements.' 317 F. 2d at p. 210 (See also, 287 F. 2d at p. 816).

The Third Circuit has continued to recognize the rights of a labor organization to reserve the right to, and to in fact, reject applicants for membership. In *Philipchuk* v. *Iron Workers,* 87 LRRM 3169, 76 LC ¶ 10,653 (1972), affirmed without published opinion 475 F. 2d 1396 (Third Cir. 1973), the Court

was confronted with a fact situation very similar to *Hughes*, except that in 1968 the Iron Workers International Constitution was amended to give local unions the right to accept or reject transfer applications. The District Court entered summary judgment for the defendant union, stating:

> The power thus created [by the Constitution amendment], to accept or reject, means simply this; no longer can it be said that acceptance by a local of an applicant for transfer is a mere ministerial act. 87 LRRM at p. 3173

The *Philipchuk* Court went on to state that *Hughes* was no longer viable authority for the plaintiffs.

The Seventh Circuit was faced with a case practically identical to *Philipchuk* in *Gavin* v. *Structural Iron Workers Local No. 1*, 553 F. 2d 28 (Seventh Cir. 1977), and the Seventh Circuit upheld the right of the defendant union to reject applicants for membership. *Gavin* was relied on by the District Court in the present case, as that Court stated:

> In light of the resignation [May 27, 1977], the plaintiff has no rights under the Act unless he has rejoined the union. He alleges he has taken all the steps necessary to rejoin but that the union has refused to accept him as a member. Pursuant to the constitution and bylaws of the union this acceptance is required before one can become a member of the union. In *Gavin* v. *Structural Iron Workers Local No. 1*, 553 F. 2d 28 (7th Cir. 1977), the Court upheld the District Court's dismissal in a case factually similar to the one now before this Court. There is no impropriety in the union's reservation of the right to reject this plaintiff's application and having done so the plaintiff cannot avail himself of the remedies contained in the LMRDA. (Axiii to Axiv of Petitioner's Appendix).

Gavin was also cited by the Seventh Circuit in its order herein which affirmed the District Court (Appendix "A" attached hereto at page A2 herein).

In *Gavin*, the Seventh Circuit succinctly stated that "Nonmembers may not obtain relief under the Reporting and Disclosure Act" 553 F. 2d at p. 30. The Court also stated that since the defendant union did not accept the transfer applications of plaintiffs they were not members and had no rights under the Act.

In the present case, there is no question but what acceptance of a membership application by the Respondent Union is required before an individual becomes a member. There is no question but what in the past the Respondent Union has refused to admit individuals to membership on a case by case basis. There is likewise no doubt about the fact that Petitioner resigned as a member and has not since that date been accepted as a member of the Respondent Union. Petitioner is not a "member" of the Respondent Union and just like the plaintiff in *Gavin*, has no rights under the Reporting and Disclosure Act.

There not only is no conflict among the Circuit Courts with respect to this case, but they in fact are in complete agreement with the position of the Respondents herein. Furthermore, the Courts have recognized that the right of labor organizations to reject applicants for membership clearly was preserved when Congress adopted the Labor-Management Reporting and Disclosure Act. With the Congress and the Courts being in agreement with the position of Respondents herein, there certainly is no reason why this Court should grant this Petition.

B. Whether a Cause of Action Can Exist Against Private Parties Under Title 42 U. S. C. Sections 1985(3) and/or 1986, When Petitioner Has Not Properly Alleged the Existence of a Class of Which He Was a Member, Has Not Properly Alleged a Violation of Any Other Federal Statute or the Constitution, and Has Not Properly Alleged the Existence of Any Conspiracy?

In *Griffin* v. *Breckenridge*, 403 U. S. 88, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971), this Court stated that Section 1985(3) was not intended to be a general federal tort law, 403 U. S. at

pp. 101-02. Respondents submit that Petitioner is attempting to make a general federal tort law out of Section 1985(3), because he has not established any violation of any federal law or the Constitution by Respondents; this attempt by Petitioner is completely contrary to the decision by this Court in *Griffin*.

Section 1985(3) requires a conspiracy involving class based invidious conduct to deprive persons of the equal protection of the laws or of equal privileges and immunities under the laws. In the present case, Petitioner alleges that he was a member of a class of persons who have run for elective office in the Respondent Union or who have opposed the incumbent candidates. Respondents have never understood what this type of allegation has to do with an action by an individual who is not a member of the Union and who is seeking membership. The District Court recognized that Petitioner could not properly allege the existence of a class and this is likewise clear from the Petition he has filed in this Court. Petitioner has an individual complaint that the Respondent Union has refused to accept him into membership, and this individual complaint certainly does not make him a member of a class, let alone a class of union members who have run for elective office in the Respondent Union.

Another point Petitioner seems to have forgotten is that a valid claim under Section 1985(3) requires a conspiracy. Petitioner has never properly alleged the existence of a conspiracy unless we are to assume that Respondent Robbins is accused of conspiring with himself. Such alleged conduct is not a conspiracy, as "It is impossible in the nature of things for a man to conspire with himself." *Morrison* v. *California,* 291 U. S. 82, 92; 78 L. Ed. 664; 54 S. Ct. 281 (1934). The challenged conduct in this case the refusal to admit Petitioner to membership, is certainly nothing more than an alleged single act by a single business entity and this does not constitute a conspiracy contemplated by Section 1985(3) *Dombrowski* v. *Dowling,* 459 F. 2d 190, 196 (Seventh Cir. 1972).

None of the cases cited by Petitioner with respect to Section 1985(3) are even close to our present case, as they involve

properly alleged violations of other federal laws or the Constitution. In addition, the cases cited by Petitioner support the position of Respondents that class based invidious discrimination and a conspiracy, both of which are lacking herein, are requirements for a Section 1985(3) claim.

Since Petitioner is without a case under Section 1985(3) he also does not have one under Section 1986, because no case can exist under Section 1986 without a valid one under Section 1985.

Petitioner's position under Sections 1985(3) and Section 1986 is completely frivolous, and it is clearly contrary to the decision of this Court in *Griffin, supra*. Petitioner cannot make a general federal tort law out of these statutes, and yet that seems to be his goal. Petitioner likewise cannot make a claim under Section 1985(3) in an individual action without a conspiracy and that also seems to be his goal. See also *Lesser* v. *Braniff Airways, Inc.,* 518 F. 2d 538 (Seventh Cir. 1975) and *Murphy* v. *Mount Carmel High School,* 543 F. 2d 1189 (Seventh Cir. 1976).

In any event, there certainly is no reason or basis for this Court agreeing to review the position Petitioner has taken under these statutes.

VII.

CONCLUSION.

The decisions of the Courts below are completely consistent with, and are in accord with, the established legal principles involved in this case, and for the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX OF RESPONDENTS.

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued November 27, 1979)

November 28, 1979

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. John M. Wisdom, *Senior Circuit Judge**
Hon. Robert A. Sprecher, *Circuit Judge*

Donald G. Davis, *Plaintiff-Appellant,*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 79-1472 *vs.*	
International Union of Chauffeurs, Teamsters, Warehousemen and Helpers, Local No. 135, et al., *Defendants-Appellees.*	No. IP 78-C-683 James E. Noland, *Judge.*

ORDER

The Court, having read the briefs, addressed itself to the record, heard oral argument on behalf of the appellant, and conferred at the bench, announced in open court that the judgment appealed from is AFFIRMED.

We agree with the decision of the district court and will affirm for the reasons stated therein. The plaintiff's claims under the Labor Management Reporting and Disclosure Act are foreclosed by our decision in *Gavin* v. *Structural Iron Workers Local No. 1*, 553 F. 2d 28 (7th Cir. 1977).

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.

* Senior Circuit Judge John M. Wisdom of the United States Court of Appeals for the Fifth Circuit is sitting by designation.

APPENDIX B.

I, Donald G. Davis, hereby resign as a member of and in Chauffeurs, Teamsters, Warehousemen And Helpers Local Union No. 135, also commonly known as Teamsters Local Union No. 135, affiliated with the International Brotherhood Of Teamsters, Chauffeurs, Warehousemen And Helpers of America, and I hereby waive and release any claim to membership in said Union, this 27th day of May, 1977.

/s/ Donald G. Davis
Donald G. Davis

In Presence Of:

/s/ Loren J. Comstock
Loren J. Comstock

27 May, 1977

/s/ Edward J. Fillenwarth
Edward J. Fillenwarth

5-27-77

APPENDIX C.

SECTION 19

(A) An applicant shall be considered a member when he shall meet all the follcwing requirements for membership:

(1) He shall have executed a written application for membership on a form provided by the Secretary-Treasurer.

(2) He shall have tendered the initiation fees and one month's dues by cash or on written authorization of checkoff.

(3) The Local Union shall have accepted his application and dues.

(4) He shall have taken the oath of obligation as a member at a regular meeting following the action upon his application provided, however, that no applicant shall become a member in the first ten days following the filing of his written application. In the event the applicant shall fail to take the obligation within a reasonable time following the acceptance of his application, he shall forfeit the monies tendered except for good cause shown.

APPENDIX D.

EXCERPTS FROM DEPOSITION OF RICHARD DININGER:

Q. 59 Do you know if anyone has ever been denied membership, their initial application for membership? Do you know of anyone who has ever been denied membership in Local 135 and never ever for one minute become a member?

A. I couldn't give any names, but in thinking back, there must have been occasions where we were organizing a company and somebody wanted to join and we might have not given them a card. That was working at a given place.

Q. 60 Do you recall the reason?

A. Run the picket line.

Q. 61 What do you mean by running the picket line? You mean he was in charge of the picket line?

A. No, they scabbed while the rest of the drivers respected it. We had a picket line set up and they would run by it and go to work.

* * * * *

Q. 82 So it was a case-by-case basis the executive Board could either refuse or admit people to membership?

A. Yes.

Mr. Cromer: Could I have the last question and answer read back to me.

(Preceding question and answer given thereto read by reporter.)

A. The ones that were brought to the attention of the executive board on charges.